STEPHEN S. WALTERS (BAR NO. 54746)
MARK J. SEIFERT (BAR NO. 217054)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
Three Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
Phone: (415) 837-1515
Fax: (415) 837-1516
E-Mail: swalters@allenmatkins.com
mseifert@allenmatkins.com

Attorneys for Defendants
DUX INTERIORS, INC. and
BO GUSTAFSSON

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHNSON DESIGN ASSOCIATES, INC., a California corporation, and SHARYN JOHNSON, an individual,

Plaintiffs,

v.

DUX INTERIORS, INC., a New York corporation, and BO GUSTAFSSON, an individual,

Defendants.

Case No. C07-05754 MMC

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 18, 2008
Time: 9:00 a.m.
Place: 450 Golden Gate Avenue
San Francisco, California
Courtroom 7
Judge: Hon. Maxine M. Chesney

NOTICE OF MOTION AND MOTION

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 18, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 7, 19th Floor, of the above referenced Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendants Dux Interiors, Inc. and Bo Gustafsson will, and hereby do, move the Court for an order dismissing the Complaint.

The motion is made on the grounds that the Complaint fails to state any claim upon which relief can be granted and therefore must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6); that the Complaint fails to provide adequate notice of the claims asserted and therefore must be dismissed pursuant to Federal Rule 8(a) or amended to provide a more definite statement pursuant to Rule 12(e); and that the Complaint, to the extent it bases any claim on allegations of fraud, fails to plead such allegations with particularity as required by Rule 9(b).

The motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Bo Gustafsson filed concurrently herewith, and on the pleadings and records in this action.

Dated: December 7, 2007

Respectfully submitted

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
STEPHEN S. WALTERS
MARK J. SEIFERT

By: /s/
STEPHEN S. WALTERS
Attorneys for Defendants
DUX INTERIORS, INC. and
BO GUSTAFSSON

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	STATEMENT OF ISSUES TO BE DECIDED	2
III.	STATEMENT OF FACTS	2
	A. The License Agreement	3
	B. Termination of the License Agreement	5
	C. Other Breach of Contract (and Unfair Competition) Allegations	6
	D. Conversion Allegations	7
	E. Emotional Distress Allegations	7
	F. Unjust Enrichment Allegations	7
	G. Unfair Competition (Section 17200) Allegations	8
	H. Allegations Concerning Johnson's Request for an Injunction	8
IV.	ARGUMENT	8
	A. Legal Standard Under Federal Rules 8(a), 9(b) 12(b)(6), and 12(e)	9
	B. Johnson Fails to State a Claim for Breach of Contract Based on the Termination Because It Admits the Breach of the License Agreement That Permitted Dux to Terminate	10
	C. Johnson's Other Assertions of Breach of Contract Consist of Vague and Conclusory Allegations and Must Be Dismissed	12
	D. Johnson Fails to State a Claim for Conversion of Its Business Because the Termination of the License Agreement Was Proper	14
	E. Johnson Fails to State a Claim for Intentional Infliction of Emotional Distress Because It Fails to Allege Facts Showing Extreme and Outrageous Conduct	15
	F. Johnson Fails to State a Claim for Unjust Enrichment Where Dux Has Engaged in No Wrongful Conduct and Has Acquired Nothing from Johnson	16
	G. Johnson Fails to State a Claim for Unfair Competition (Cal. Bus. & Prof. Code § 17200) Where It Has Identified No Unlawful or Otherwise Improper Conduct on the Part of Dux	17
	H. Johnson Has Failed to State Grounds for an Injunction Because It Does Not Have a Likelihood of Success on the Merits, It Has Failed to Allege Facts Indicating Any Irreparable Injury, and It Has Failed to Allege Facts Indicating the Inadequacy of a Remedy at Law	18

Page

V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Balistreri v. Pacifica Police Dep't.
901 F.2d 696 (9th Cir. 1990) 9

Bell Atlantic Corp. v. Twombly
127 S. Ct. 1955 (2007) 9, 16

Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.
83 Cal. Rptr. 2d 548 (Cal. 1999) 17

Chambers v. Time Warner, Inc.
282 F.3d 147 (2d Cir. 2002) 2

Cochran v. Cochran
76 Cal. Rptr. 2d 540 (Cal. Ct. App. 1998) 15, 16

Crown Paper Liquidating Trust v. Am. Intern. Group, Inc.
No. C-07-2308 MMC, 2007 WL 4207943 (N.D. Cal. Nov. 27, 2007) 2

Dep't of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.
448 F.3d 1118 (9th Cir. 2006) 18

Desaigoudar v. Meyercord
223 F.3d 1020 (9th Cir. 2000) 9, 13

Dinosaur Development, Inc. v. White
265 Cal. Rptr. 525 (Cal. Ct. App. 1989) 17

eBay Inc. v. MercExchange, L.L.C.
126 S. Ct. 1837 (2006) 18

Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.
656 F. Supp. 914 (S.D.N.Y. 1987) 13

G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.
958 F.2d 896 (9th Cir. 1992) 14

Hewlett-Packard Co. v. Intergraph Corp.
No. C 03-2517 MJJ, 2003 WL 23884794 (N.D. Cal. Sept. 6, 2003) 9, 12

Jones v. Cmty. Redevelopment Agency
733 F.2d 646 (9th Cir. 1984) 9, 12

JRS Prod., Inc. v. Matsushita Elec. Corp. of Am.
8 Cal. Rptr. 3d 840 (Cal. Ct. App. 2004) 14

Kern Oil & Refining Co. v. Tenneco Oil Co.
792 F.2d 1380 (9th Cir. 1986) 10

Knievel v. ESPN
393 F.3d 1068 (9th Cir. 2005) 2

Page(s)

McHenry v. Renne
84 F.3d 1172 (9th Cir. 1996). 10, 12

Pareto v. FDIC
139 F.3d 696 (9th Cir. 1998) 9, 16

Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.
998 F.2d 1192 (3d Cir. 1993) 3

Pino v. Ryan
49 F.3d 51 (2d Cir. 1995) 9, 11

Schneider v. TRW, Inc.
938 F.2d 986 (9th Cir. 1991) 16

Thueson v. U-Haul Int'l, Inc.
50 Cal. Rptr. 3d 669 (Cal. Ct. App. 2006) 14

Venture Assoc. Corp. v. Zenith Data Sys. Corp.
987 F.2d 429 (7th Cir. 1993) 3

Vess v. Ciba-Geigy Corp USA
317 F.3d 1097 (9th Cir. 2003) 9, 13

Weinstein v. Saturn Corp.
No. C-07-0348 MMC, 2007 WL 1342604 (N.D. Cal. May 8, 2007) 10, 13

Statutes

15 U.S.C. § 1111 11

Cal. Bus. & Prof. Code § 17200 . . . . . 8, 13, 17

Cal. Bus. & Prof. Code § 20001(c) 13

Cal. Bus. & Prof. Code § 20007 13

Cal. Bus. & Prof. Code § 20020 14

Cal. Bus. & Prof. Code § 20021(d) 14

Rules

Fed. R. Civ. P. 11 2

Fed. R. Civ. P. 11(a) 2

Fed. R. Civ. P. 12(b)(6) 8, 9, 19

Fed. R. Civ. P. 12(e) 8, 10, 12, 19

Fed. R. Civ. P. 65 8

Fed. R. Civ. P. 65.1 . . . . . 8, 18

Page(s)

Fed. R. Civ. P. 8(a) 12, 19
Fed. R. Civ. P. 8(a)(2) 9
Local Rule 65-1 ..... 8, 18
Local Rule 65-2 ..... 8, 18

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Johnson Design Associates, Inc. and Sharyn Johnson[1] bring this suit against Defendants Dux Interiors, Inc. and Bo Gustafsson[2] based on Dux's termination of the license agreement ("License Agreement") between Dux and Johnson following Johnson's undisputed breach of that agreement. Johnson's admitted breach provided Dux with grounds to terminate the License Agreement. The termination, therefore, cannot support Johnson's claim for breach of contract, or any other claim. Johnson's other breach of contract allegations do not provide fair notice of the claim against Dux, and also must be dismissed. At a minimum, Johnson should be ordered to provide a more definite statement of its claim.

Each of Johnson's other claims must be dismissed as well. Johnson fails to state a claim for conversion because that claim is based on the termination, which was proper. Johnson fails to state a claim for intentional infliction of emotional distress because it does not allege any facts (as opposed to bare conclusions) demonstrating the type of extreme and outrageous conduct that would be necessary to support such a claim. Johnson fails to state a claim for unjust enrichment because it can identify no wrongful conduct by Dux and no transfer of any property to Dux. Johnson fails to state a claim for unfair competition because it can identify no unlawful or otherwise improper conduct by Dux in support of this claim.

Finally, Johnson's "claim" for an injunction must be dismissed because it is not even a separate claim, but is instead a remedy. As there is no basis for liability on the part of Dux, there is no basis to award an injunction or any other remedy. Moreover, Johnson has not identified any irreparable injury it would suffer or any reason why it could not be compensated with money damages were it to prevail on its claims.

The Complaint should be dismissed in its entirety for each and all of these reasons.

---

[1] This motion will use the term "Johnson" interchangeably to refer to Johnson Design Associates, Inc., Ms. Johnson, or both, unless otherwise indicated.

[2] This motion will use the term "Dux" interchangeably to refer to Dux Interiors, Inc., Mr. Gustafsson, or both, unless otherwise indicated.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether Johnson fails to state a claim for breach of contract where it admits having breached the License Agreement and that Dux terminated the agreement accordingly.
2. Whether Johnson's other assertions concerning breach of contract fail to state a claim, or provide adequate notice of the claim, where they consist entirely of vague and conclusory allegations.
3. Whether Johnson fails to state a claim for conversion of its business where the contract termination was proper.
4. Whether Johnson fails to state a claim for intentional infliction of emotional distress where there are no allegations of facts showing extreme and outrageous conduct.
5. Whether Johnson fails to state a claim for unjust enrichment where Dux has engaged in no wrongful conduct and has acquired nothing from Johnson.
6. Whether Johnson fails to state a claim for unfair competition where it has identified no unlawful or otherwise improper conduct by Dux.
7. Whether Johnson fails to state grounds for an injunction where it has no likelihood of success on the merits of any of its claims, has not alleged facts indicating any irreparable injury, and has not alleged facts demonstrating the inadequacy of a remedy at law.

III. STATEMENT OF FACTS

The Complaint[3] concerns the allegedly wrongful termination of the License Agreement[4] between Johnson and Dux. Complaint ¶¶ 1, 13-14. Johnson purports to assert six claims for relief

[3] The Complaint (served Nov. 19, 2007) has not been signed and thus violates Federal Rule of Civil Procedure 11. Pursuant to that rule, it must be stricken if not promptly signed. Fed. R. Civ. P. 11(a).

[4] Although Johnson has not attached a copy of the License Agreement to the Complaint, the Court may consider the agreement (the authenticity of which is not in dispute) in ruling on the present motion. *See Crown Paper Liquidating Trust v. Am. Intern. Group, Inc.*, No. C-07-2308 MMC, 2007 WL 4207943, *2 (N.D. Cal. Nov. 27, 2007); *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (consideration of document referenced in complaint does not convert motion to dismiss into motion for summary judgment); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 n.3 (2d Cir. 2002) (collecting cases). Considering a document in this manner is acceptable because "[o]therwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it

against Dux Interiors, Inc., most of which relate to the allegedly wrongful termination, as follows: (1) injunctive relief, (2) breach of contract and the implied covenant and unfair competition, (3) conversion, (4) intentional infliction of emotional distress, (5) unjust enrichment, and (6) violation of the California unfair competition law. Complaint ¶¶ 22-52. The claims for intentional infliction of emotional distress and unjust enrichment also are asserted against Mr. Gustafsson personally. *Id.* ¶¶ 41-47.

A. The License Agreement

The License Agreement is central to the Complaint in general, and the breach of contract claim in particular. The License Agreement sets forth the parties' rights and obligations with respect to Johnson's use of Dux's marketing plan, known as the "Duxiana Concept." License Agreement, at p.1 & § 1.3. The Duxiana Concept is a system for promoting the retail sale at "Duxiana Shops" of Dux beds, mattresses, and related products. *Id.* § 1.1. The License Agreement accordingly addresses a number of issues pertaining to the use of Dux intellectual property, advertising, store presentation, initial and subsequent purchases, reporting, and audits. *See, e.g., id.* Parts 2-12.

In connection with this system, the License Agreement permitted Johnson to use certain registered trademarks (as well as non-registered trademarks) owned by Dux, provided that Johnson adhered to the requirements set forth in the agreement. *Id.* §§ 1.13, 2.1, 3.1-3.6, 8.3-8.5. The License Agreement states,

> You [i.e., Johnson] further agree that you shall make use of the Duxiana Concept and the Duxiana Trademark only in accordance with the standards specified herein, and that you shall use the Trademark 'Dux' only to refer to and identify products so marked which are sold in your Shop, or to the companies involved in the manufacture or distribution of such products, and in no other way whatsoever.

Id. § 3.1; *see also id.* § 3.4 ("You will not have any right to use the Trademarks other than as provided by this Agreement.").

---

relied." *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). A copy of the License Agreement is attached as Exhibit A to the Declaration of Bo Gustafsson in Support of Defendant's Motion to Dismiss Complaint ("Gustafsson Declaration"), filed concurrently herewith.

The License Agreement expressly distinguishes Dux's registered trademarks DUX and DUXIANA[5] from its other trademarks, requires that these registered trademarks be displayed with the trademark registration symbol (i.e., the "®" symbol) whenever used by Johnson, and requires Dux's prior approval for Johnson's marketing materials. *See, e.g., id.* §§ 1.13, 3.1-3.4, 8.3-8.5. Section 1.13 defines "Trademarks" as "the registered trademarks 'Duxiana' and 'Dux' and any other Trademarks, trade names and service marks – whether registered or not – used by [Dux] in connection with the Duxiana Concept." *Id.* § 1.13. Of particular importance to this case are Sections 3.3 and 8.3, which required Johnson to submit its marketing and other materials to Dux for prior approval whenever a Dux trademark would be used, and expressly required use of the "®" symbol with such materials. Section 3.3 states as follows:

> Any and all documents or other printed or written materials on which you intend to apply the Trademarks, including stationery, brochures, invoices, etc., shall be approved by [Dux] in writing prior to use thereof.
>
> On any and all such written materials, as well as on all signs identifying your Shop and in any advertising or other printed materials prepared by you or printed materials used in the operation of your Shop, *the Trademarks "Dux" and "Duxiana," and any other Trademarks which [Dux] may hereafter advise you that it has registered, shall be used only with the standard registration mark (an encircled R) adjacent thereto*.

Id. § 3.3 (emphasis added); *see also id.* § 3.2 (requiring use of "®" symbol next to "Duxiana" in name of Johnson's shop), § 8.5 (requiring use of Trademarks on, and prior approval of, signage and stating, "Except to the extent otherwise required by law, you agree to operate the Duxiana Shop only under the name "Duxiana" or the trade name permitted by section 3.2 without any accompanying words or symbols or any nature (except the registration mark) unless approved in writing in advance by [Dux]").

Similarly, Section 8.3 required the use of the "®" symbol next to any use of "Dux" or "Duxiana" in advertisements, and required prior review and approval by Dux:

---

[5] Johnson does not and cannot dispute that DUX and DUXIANA are registered. License Agreement §§ 1.3, 3.1 ("As between ourselves you agree that you do not and will not, during or after the term of this agreement, dispute the validity of the Trademarks, any registration thereof or the rights of [Dux] and its licensees thereto.").

> *In order to control the way in which the Trademarks, including the registered "Duxiana" and "Dux" trademarks, are used, and in order to ensure the uniformity and quality of advertising of Duxiana Products, [Dux] requires that its "Duxiana" and "Dux" trademarks be used only in styles and formats approved by [Dux] and, further, that it have the opportunity to review, and approve in advance, the content, form and method of dissemination or publication of any advertisement or advertising or promotional materials* relating to Duxiana Products or Duxiana Shops. You therefore agree that except for use of the mark "Duxiana" as part of your trade name pursuant to section 3.2 hereof, *you will use the "Dux" and "Duxiana" trademarks in any such advertisements or promotional materials only in the styles and formats shown in Addendum No. 4 and with the registration mark (encircled R) adjacent thereto, and you further agree to submit for prior [Dux] approval the text and proof of any proposed written advertising*, or the script or a video or audio recording of any television or radio advertising, before publishing or disseminating the same. *You further agree not to use any promotional or advertising programs, materials or text which [Dux] has not approved.*

Id. § 8.3 (emphasis added); *see also id.* § 8.4 (requiring use of Trademarks on, and prior approval of, bags, mailing and other packaging materials). Johnson admits that it did not use the "®" symbol as required by these provisions. Complaint ¶ 14.

The License Agreement also contains certain provisions governing its termination. *See* License Agreement §§ 15-16 (as modified in Addendum 1). Section 15.2 states that either party may terminate the License Agreement upon the occurrence of any of several events, including "if the other party shall be in default of any of its obligations hereunder and shall have failed to correct or cure such default within thirty (30) calendar days after having received written notice of such default." *Id.* § 15.2(a). In the event that Dux is the terminating party under Section 15, the agreement states that Dux shall give Johnson 60 days written notice of the reasons for the termination. *Id.* § 15.2.

B. Termination of the License Agreement

On October 12, 2007, Dux notified Johnson that it was terminating the license agreement based on an incurable breach by Johnson, specifically, Johnson's failure to use the trademark registration symbol (i.e., the "®" symbol) in a mailing that it sent to its customers, and Johnson's failure to obtain approval from Dux prior to issuing the advertisement. Complaint ¶ 14.[6] Johnson

[6] The notice states these grounds for termination. A copy of the notice is attached to the

expressly admits its failure to use the trademark registration symbol. *Id.* The Complaint alleges that the failure was curable (*id.* ¶ 26), but does not allege any attempt to cure it. The Complaint alleges that the termination was "wrongful" and a "pretext" to obtain Johnson's business. *Id.* ¶¶ 15, 33(a), 26.

C. Other Breach of Contract (and Unfair Competition) Allegations

The Complaint contains a number of other allegations, including fraud, pertaining to Dux's alleged breach of the License Agreement. The Complaint alleges that Dux caused Johnson to lose sales and profits by manufacturing defective merchandise and then putting a hold on bed sales for a period of 30 days in 2006. *Id.* ¶¶ 19, 33(b). It alleges that Dux has breached the contract by failing to make certain payments, including warranty reimbursements. *Id.* ¶¶ 20, 33(c). The Complaint alleges, on information and belief, that Dux has breached the License Agreement by offering prices, discounts and incentives to other distributors but not to Johnson. *Id.* ¶¶ 21, 33(e). (The Complaint does not, however, allege the basis for such information and belief.) It alleges that Dux breached the License Agreement and the covenant of good faith and fair dealing by "engaging in a scheme to defraud plaintiffs out of the distributorship/franchise and converting it to its own account or that of its associates," not properly advertising and requiring Johnson to spend money on "ineffectual advertising," diverting Johnson's orders to Dux or "other more favored franchisees," raising prices without the required notice, and interfering with relations with Johnson's employees. *Id.* ¶ 33.

Additionally, the Complaint alleges that certain of the alleged breaches of the License Agreement also amounted to violations of unfair competition and other laws. *Id.* ¶ 34 (alleging that Dux offered prices, discounts and incentives to other distributors but not to Johnson, and that this violated "common law unfair competition [and] federal and state antitrust law"), ¶ 35 (alleging that the termination of the License Agreement and attempt to "convert the franchise to [Dux's] own account or that of its associates" violated the California Franchise Relations Act).

Gustafsson Declaration as Exhibit B. The Court may consider the notice in deciding the present motion because the notice has been referenced in the Complaint. *See supra* note 4.

D. Conversion Allegations

The Complaint alleges that Dux, by terminating the license agreement, has "converted Plaintiff's valuable property to their own account or those of their associates." *Id.* ¶ 38. It alleges that in so doing, Dux acted with fraud. *Id.* ¶ 40.

E. Emotional Distress Allegations

The Complaint contains allegations pertaining to an emotional distress claim. Complaint ¶¶ 16-18, 42-44. The Complaint generally alleges that Dux "repeatedly threatened and intimidated Plaintiffs that they should sell their business Dux's associates [sic] (including one Dan Udoutch, a San Francisco resident) 'while they still have something to sell.'" *Id.* ¶ 16. It goes on to allege that Mr. Gustafsson, while present in California in 2007, called Ms. Johnson and "continued to harass and threaten her about 'selling' her business" to Dux's associates." *Id.* The Complaint alleges that Mr. Gustafsson, at a mandatory sales meeting in August 2006, "tried to intimidate and inflict such great emotional distress on Johnson that she would capitulate and relinquish her business" to Dux or its associates, and that "Ms. Johnson left the meeting distraught, shaking, and in desperate fear for her livelihood." *Id.* ¶ 17. The Complaint reiterates the allegation that Mr. Gustafsson has "repeatedly threatened and intimidated Ms. Johnson." *Id.* The Complaint alleges that "Dux has also sent harassing communications and the termination notice to Plaintiffs['] employees with intention of disrupting such employment relations." *Id.* ¶ 18. The Complaint alleges that Mr. Gustafsson and other Dux employees have "intentionally and/or recklessly engaged in conduct toward ... Ms. Johnson that is extreme and outrageous, with intent to cause her emotional harm and relinquish her franchise," and that the "wrongful [and] pretextual termination was intend to and did cause emotional harm." *Id.* ¶ 42. This conduct allegedly caused Ms. Johnson severe anxiety, mental anguish, and emotional distress. *Id.* ¶ 43.

F. Unjust Enrichment Allegations

The Complaint alleges that Johnson has invested time and money in building its business in reliance on a continuing relationship with Dux, and that Dux has breached its obligations by wrongfully terminating the Licensing Agreement to benefit itself. *Id.* ¶ 46. The Complaint alleges that this constitutes unjust enrichment. *Id.*

G. Unfair Competition (Section 17200) Allegations

The Complaint alleges that the "scheme to terminate the instant franchise and defraud Plaintiffs out of their valuable property and convert it to their own accounts or those of their associates" violates California Business and Professions Code § 17200. Complaint ¶ 50.

H. Allegations Concerning Johnson's Request for an Injunction

As a separate claim for relief, the Complaint alleges that Johnson has "suffered and continues to suffer immediate, substantial and irreparable injury" due to Dux's termination of the License Agreement. *Id.* ¶ 23-26. It also alleges that Johnson has "no adequate remedy at law." *Id.* ¶ 28. The Complaint purports to request a preliminary injunction. *Id.* ¶ 29. Johnson has not, however, moved for a temporary restraining order or preliminary injunction in accordance with Federal Rules 65 and 65.1, and Local Rules 65-1 and 65-2.

IV. ARGUMENT

With minor exceptions, Johnson's claims depend on the assertion that Dux's termination of the License Agreement was wrongful. The Complaint fails on that fundamental point. Johnson admitted breaching the agreement, and this breach triggered Dux's right to terminate. Johnson's only response is that the breach was curable. But given the nature of the breach and the damage to Dux's trademarks and good will, any attempt at a cure would have been futile, thus obviating the cure provision in the License Agreement. At any rate, Johnson does not, and cannot, allege that it has cured the breach or even attempted to do so in the 30 days following Dux's notice. This is fatal to any claim predicated on wrongful termination.

Johnson's remaining claims fail because they do not state a claim (Rule 12(b)(6)), do not provide adequate notice to Dux of the claims asserted against it (Rule 8(a)), or both. In addition, each of Johnson's purported claims, to the extent they are based on allegations of fraud, must be dismissed pursuant to Rule 9(b) for failure to plead them with particularity.

Dux respectfully submits that the Complaint should be dismissed in its entirety. In the event that the Court does not dismiss one or more claims, Johnson should be ordered to provide a more definite statement of such claims pursuant to Rule 12(e).

A. Legal Standard Under Federal Rules 8(a), 9(b) 12(b)(6), and 12(e)

Federal Rule of Civil Procedure 8(a) requires dismissal of a complaint that fails to give adequate notice to the defendants of the claims asserted against them. *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646, 649-50 (9th Cir. 1984) ("conclusional" allegations that were "unsupported by any facts" failed to provide fair notice to defendants, and thus claims were properly dismissed); *Hewlett-Packard Co. v. Intergraph Corp.*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1 (N.D. Cal. Sept. 6, 2003) (dismissing claims under Rule 8(a)(2)).

Federal Rule 9(b) imposes a heightened pleading standard for claims that are grounded on allegations of fraud. Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (applying Rule 9(b) to unfair competition claim). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (internal quotation marks and citation omitted); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 2000) (circumstances of fraud must be pled "with a high degree of meticulousness"). Where allegations of fraud fail to meet Rule 9(b)'s heightened standard, they are "disregarded." *Vess*, 317 F.3d at 1105.

Federal Rule 12(b)(6) requires dismissal where there is a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court must dismiss a claim if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on a Rule 12(b)(6) motion, courts are to accept the plaintiff's allegations as true, but need not accept conclusory allegations or unwarranted inferences as true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007) (noting that "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("[C]onclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss."). Finally, although a plaintiff typically does not need to anticipate affirmative defenses in a complaint, dismissal is proper if a defense appears on the face of the complaint, i.e., if the plaintiff pleads itself out of court. *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995) (affirming dismissal and noting that "caution [in deciding a motion to dismiss] need not lead to paralysis").

Federal Rule 12(e) requires a more definite statement where a complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e); *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

B. Johnson Fails to State a Claim for Breach of Contract Based on the Termination Because It Admits the Breach of the License Agreement That Permitted Dux to Terminate.

The interpretation of a contract is a question of law. *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1383 (9th Cir. 1986). A court may interpret a contract in deciding a motion to dismiss. *See, e.g., Weinstein v. Saturn Corp.*, No. C-07-0348 MMC, 2007 WL 1342604, *1-*2 (N.D. Cal. May 8, 2007).

Johnson's claim for breach of contract fails because its own allegations show that the termination at issue was proper. The License Agreement strictly governs the use of Dux's intellectual property, especially its DUX and DUXIANA registered trademarks. License Agreement §§ 1.13, 2.1, 3.1-3.6, 8.3-8.5. These requirements, which span several pages of the agreement, repeatedly and expressly state that the DUX and DUXIANA registered trademarks must be accompanied with the trademark registration ("®") symbol. Section 3.3 states that "the Trademarks 'Dux' and 'Duxiana,' and any other Trademarks which [Dux] may hereafter advise you that it has registered, *shall be used only with the standard registration mark (an encircled R) adjacent thereto*." *Id.* § 3.3 (emphasis added). Similarly, Section 8.3 requires prior approval of advertisements prepared by Johnson and mandates that Johnson "use the 'Dux' and 'Duxiana' trademarks in any such advertisements or promotional materials only in the styles and formats shown in Addendum No. 4 and *with the registration mark (encircled R) adjacent thereto*." *Id.* § 8.3 (emphasis added); *see also id.* § 3.2 (requiring use of "®" symbol next to "Duxiana" in name of Johnson's shop), § 8.5 (stating that use of "Duxiana" in shop name shall be done without any accompanying words or symbols except registration mark). As Section 8.3 makes clear, the strict regulation of Johnson's use of these trademarks is necessary "[i]n order to control the way in which the Trademarks, including the registered 'Duxiana' and 'Dux' trademarks, are used, and in order to ensure the uniformity and quality of advertising of Duxiana Products." *Id.* § 8.3. The use of the "®" symbol with these trademarks is particularly important to Dux's ability to protect its

trademarks and maximize its ability to obtain damages in the event of infringement. *See* 15 U.S.C. § 1111 (requiring trademark registrant to give notice of registration with "®" symbol, or words "Registered in U.S. Patent and Trademark Office" or "Reg. U.S. Pat. & Tm. Off.", in order to recover profits and damages, unless infringer had actual notice of registration). Johnson admits, as it must, that it failed to use the "®" symbol in the mailing sent to its customers, as required by these provisions. Complaint ¶ 14. Also, the failure to obtain prior approval from Dux with respect to this advertisement (*see supra* note 6) provided an additional basis for the termination.

As a result of Johnson's breach, Dux sent a termination notice pursuant to Sections 15 and 16 of the License Agreement. Complaint ¶ 14; License Agreement §§ 15-16. Section 15.2 permits termination for breach of the agreement. *Id.* § 15.2(a). Although Section 15.2 contains a 30-day cure provision, Johnson does not allege that it made any effort whatsoever to cure this breach, let alone that it actually cured it.[7] In admitting the breach that justified termination, Johnson assumed the obligation to also plead a cure, which it did not do. *See Pino*, 49 F.3d at 53.

Moreover, Johnson's breach is incurable as a matter of law because there is no way to retrieve every mailing sent by Johnson. This obviated the cure provision. *See* Raymond T. Nimmer & Jeff Dodd, Modern Licensing Law § 11:7 (2007) ("[S]ome breaches cannot be cured because the harm has occurred and any effort to reverse it is ineffectual. In such cases, unless the contract expressly states to the contrary, no cure provision should be interpreted to hinge the rights of a party on the occurrence of the impossible."). At any rate, whether Johnson's admitted breach is curable is moot given Johnson's failure to plead a cure, and the only remaining possible effect of the cure provision would be to extend by 30 days the effective date of the termination. *See* License Agreement § 15.2 (termination notice 30 days after curable, but uncured, breach; effective date of termination by Dux 60 days after termination notice).

Dux's termination was consistent with the terms of the License Agreement in light of Johnson's admitted breach.

[7] Indeed, Dux is not aware of any effort on the part of Johnson to cure.

C. Johnson's Other Assertions of Breach of Contract Consist of Vague and Conclusory Allegations and Must Be Dismissed.

The Complaint contains certain allegations, including fraud, that purport to indicate breaches (in addition to the termination) of the License Agreement by Dux. Given the length of the parties' course of dealing (over 16 years (Complaint ¶ 14)), it is not enough for Johnson to generally allege that Dux failed to make payments, including warranty reimbursements. Complaint ¶¶ 20, 33(c). Nor is it enough to generally allege that Dux has breached the License Agreement by offering prices, discounts and incentives to other distributors but not to Johnson. *Id.* ¶¶ 21, 33(e). The same may be said of the general allegations that Dux manufactured defective merchandise; neither the merchandise nor the defects are described, and there is no allegation of when these events supposedly occurred. *Id.* ¶¶ 19, 33(b). The same is true of the allegation that Dux temporarily put a hold on sales in 2006 – there is no indication of circumstances showing a breach of the License Agreement. *Id.* ¶¶ 19. And the same applies to the allegations that Dux breached the covenant of good faith and fair dealing by "engaging in a scheme to defraud plaintiffs out of the distributorship/franchise and converting it to its own account or that of its associates," not properly advertising and requiring Johnson to spend money on "ineffectual advertising," diverting Johnson's orders to Dux or "other more favored franchisees," raising prices without the requisite notice, and interfering with relations with Johnson's employees – there are no facts whatsoever to indicate what events Johnson is talking about or when they supposedly occurred. *Id.* ¶ 33(c)-(d), (f)-(h). And such detail is especially important in a case where the parties have done business for 16 years, because even if breaches occurred, the claim may be barred by the statute of limitations or long since waived.

None of these breach allegations provides adequate information about the circumstances of the asserted breaches to enable Dux to frame a responsive pleading and should be dismissed, or replaced with a more definite statement. Fed. R. Civ. P. 8(a), 12(e); *Jones*, 733 F.2d at 649-50; *Hewlett-Packard*, No. C 03-2517 MJJ, 2003 WL 23884794, at *1; *McHenry*, 84 F.3d at 1179. Dismissal is especially warranted with respect to the allegation that Dux engaged in a "scheme to defraud plaintiffs" in paragraph 33(c) of the Complaint, since fraud must be alleged with

particularity. Fed. R. Civ. P. 9(b); *Vess*, 317 F.3d at 1103-04, 1105-06; *Desaigoudar*, 223 F.3d at 1022-23.

Finally, the Complaint alleges that certain of the alleged breaches of contract also amounted to violations of unfair competition and other laws. Complaint ¶ 34 (alleging that Dux offered prices, discounts and incentives to other distributors but not to Johnson, and that this violated "common law unfair competition [and] federal and state antitrust law"), ¶ 35 (alleging that the termination of the agreement and attempt to "convert the franchise to [Dux's] own account or that of its associates" violated the California Franchise Relations Act ("CFRA")). As an initial matter, it is unclear whether Johnson is attempting to assert antitrust and CFRA claims that are distinct from its breach of contract claim (*cf.* the claim for violation of section 17200 of the California Business and Professions Code (Complaint ¶¶ 48-52), discussed below in Part IV.G). Nonetheless, out of an abundance of caution, Dux will briefly address the antitrust and CFRA issues here. These claims fail to the extent they are based on termination of the License Agreement, or any of the other purported breaches, for the reasons discussed above. Beyond that, these claims are again conclusory in the extreme and provide Dux with no notice of what statutory violations are at issue.[8] The Complaint only refers to "federal and state antitrust law" (Complaint ¶ 34), but does not indicate which ones. And if the antitrust violations are based on discriminatory pricing, Johnson comes nowhere close to satisfying the elements of such a claim, particularly the requirement that the alleged discrimination must substantially lessen competition or tend to create a monopoly. *Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 656 F. Supp. 914, 919 (S.D.N.Y. 1987); 15 U.S.C. §§ 13-13a. Similarly, the CFRA does not apply because the Complaint fails to allege the payment of a franchise fee under the License Agreement.[9] *See* Cal. Bus. & Prof. Code §§ 20001(c), 20007; *Thueson v. U-Haul Int'l, Inc.*, 50

---

[8] In addition, to the extent that Johnson alleges on information and belief that different prices were offered to different distributors and that this violated the common law and various statutes (potentially including fraud) (Complaint ¶ 21), Johnson was required to allege the basis for such information and belief. *Weinstein*, No. C-07-0348 MMC, 2007 WL 1342604, *1 n.1.

[9] The License Agreement provides that a "license fee" may be charged (License Agreement § 12 & Addendum 5), but that has never been done and Johnson has not alleged otherwise.

Cal. Rptr. 3d 669, 671-73 (Cal. Ct. App. 2006) (discussing requirement of franchise fee before CFRA applies in light of CFRA's purpose of protecting franchisees' initial investment). At any rate, even if Johnson's business were a franchise under the CFRA, the statute permits termination of a franchise for a number of reasons, including (a) a failure to comply with "any lawful requirement of the franchise agreement" (following notice and an opportunity to cure), or (b) immediately where the franchisee engages in conduct that "reflects materially and unfavorably" upon the operation and reputation of the business. Cal. Bus. & Prof. Code §§ 20020, 20021(d). As stated, the termination was proper, and any cure period is irrelevant in light of Johnson's failure to plead a cure.

D. Johnson Fails to State a Claim for Conversion of Its Business Because the Termination of the License Agreement Was Proper.

"In California, conversion has three elements: ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992). The Complaint bases the conversion claim on Dux's termination of the license agreement. Complaint ¶ 38. As part of the conversion claim, the Complaint alleges that Dux acted with fraud. *Id.* ¶ 40.

These vague allegations are insufficient to state a conversion claim. Johnson cannot satisfy the "wrongful disposition" element of conversion because its own allegations show that the termination was proper. *See supra* Part IV.B. Moreover, Johnson cannot use this theory of conversion to transform its breach of contract claim into a tort claim. *See JRS Prod., Inc. v. Matsushita Elec. Corp. of Am.*, 8 Cal. Rptr. 3d 840, 849 (Cal. Ct. App. 2004) ("[A] party to a contract cannot recover damages in tort for breach of contract."). Finally, to the extent this claim is based on fraud, Johnson has come nowhere close to pleading with particularity. Fed. R. Civ. P. 9(b); *Vess*, 317 F.3d at 1103-04, 1105-06; *Desaigoudar*, 223 F.3d at 1022-23. The conversion claim must be dismissed.

E. Johnson Fails to State a Claim for Intentional Infliction of Emotional Distress Because It Fails to Allege Facts Showing Extreme and Outrageous Conduct.

Intentional infliction of emotional distress requires a plaintiff to establish three elements: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." *Cochran v. Cochran*, 76 Cal. Rptr. 2d 540, 543 (Cal. Ct. App. 1998). Regarding the first element, California imposes a demanding standard for showing that conduct is sufficiently extreme and outrageous to be actionable: the conduct "must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id.* (internal quotation marks and citations omitted). The *Cochran* court summarized this requirement as follows:

> In evaluating whether the defendant's conduct was outrageous, it is "not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."
>
> Further, the tort does not extend to "mere insults, indignities, *threats*, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, *and some safety valve must be left through which irascible tempers may blow off relatively harmless steam....*"

Id. at 545 (quoting Restatement (2d) Torts § 46 comment d, and adding emphasis).

In *Cochran*, the court considered whether an alleged death threat in a telephone message was sufficiently outrageous to support liability for intentional infliction of emotional distress. *Id.* at 546-47. The court concluded that the threat, even when combined with other threats on

previous occasions, was not actionable. *Id.*; *see also Schneider v. TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) (applying California law and affirming summary judgment for defendant where plaintiff's evidence showed her supervisor had screamed, yelled and made threatening gestures while criticizing her job performance). And while courts will consider whether a special relationship or other circumstances make the plaintiff particularly vulnerable to the defendant's conduct, "major outrage is still essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Cochran*, 76 Cal. Rptr. 2d at 544-45 (internal quotation marks and citations omitted). Indeed, *Schneider*, in which the court affirmed summary judgment for the defendant, involved threats made during an employment relationship. *Schneider*, 938 F.2d at 992-93.

Here, Johnson's emotional distress allegations consist of conclusory assertions that Mr. Gustafsson "threatened" and "harassed" Ms. Johnson on a number of occasions, and that this was extreme and outrageous. Complaint ¶¶ 16-18, 42-44. These conclusory allegations are examples of what the Court can and should disregard in ruling on a motion to dismiss. *Twombly*, 127 S. Ct. at 1965-66 (noting that "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"); *Pareto*, 139 F.3d at 699. At any rate, even if these allegations were sufficiently definite, they still would fail because mere threats and harassment are just not actionable under California law. *Cochran*, 76 Cal. Rptr. at 543, 545-47; *Schneider*, 938 F.2d at 992-93. In addition, Johnson pleads no special relationship here. The claim must be dismissed.

F. Johnson Fails to State a Claim for Unjust Enrichment Where Dux Has Engaged in No Wrongful Conduct and Has Acquired Nothing from Johnson.

The Complaint alleges in cursory terms that Johnson has invested time and money in building its business in reliance on a continuing relationship with Dux, and that Dux has breached its obligations by wrongfully terminating the Licensing Agreement to benefit itself. Complaint ¶ 46. The Complaint alleges that this constitutes unjust enrichment. *Id.* There are at least two fatal flaws in Johnson's theory. First, Dux's termination of the License Agreement was not improper. *See supra* Part IV.B. Second, there has been no movement of any property to Dux's benefit. Under these circumstances, it cannot be said that Dux has been unjustly enriched, and the claim

must be dismissed. *See generally Dinosaur Development, Inc. v. White*, 265 Cal. Rptr. 525, 530 (Cal. Ct. App. 1989).

G. Johnson Fails to State a Claim for Unfair Competition (Cal. Bus. & Prof. Code § 17200) Where It Has Identified No Unlawful or Otherwise Improper Conduct on the Part of Dux.

The Complaint alleges that the "scheme to terminate the instant franchise and defraud Plaintiffs out of their valuable property and convert it to their own accounts or those of their associates" violates California Business and Professions Code § 17200. Complaint ¶ 50. Section 17200 states, "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." Cal. Bus. & Prof. Code § 17200.

Johnson does not purport to allege any false advertising by Dux, so its Section 17200 claim is predicated on "unlawful, unfair or fraudulent" practices. Johnson fails, however, to allege facts supporting any of these prongs of Section 17200. Johnson does not allege facts showing the violation of any laws by Dux. *See supra* Part IV.C (discussing inapplicability of antitrust laws and CFRA). Nor does Johnson allege facts showing fraudulent practices by Dux. Indeed, such allegations would need to be stated with particularity, and Johnson has not even attempted to do so. *Vess*, 317 F.3d at 1103-04 (applying Rule 9(b) to unfair competition claim).

Finally, Johnson does not allege facts showing unfair practices within the meaning of Section 17200. Unfairness under Section 17200 does not depend on "purely subjective notions of fairness," but instead requires a determination that the practice at issue "offends an established public policy or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 83 Cal. Rptr. 2d 548, 564 (Cal. 1999) (internal quotation marks and citations omitted). Johnson's Section 17200 claim fails because it is premised on Dux's termination of the License Agreement. A mere breach of contract, without more, does not support liability under Section 17200. More to the point, the termination was not a breach of contract or otherwise improper. *See supra* Part IV.B. The Section 17200 claim must be dismissed.

H. Johnson Has Failed to State Grounds for an Injunction Because It Does Not Have a Likelihood of Success on the Merits, It Has Failed to Allege Facts Indicating Any Irreparable Injury, and It Has Failed to Allege Facts Indicating the Inadequacy of a Remedy at Law.

The Complaint states that Johnson seeks an injunction, but Johnson has not moved for a temporary restraining order or a preliminary injunction pursuant to Federal Rules 65 and 65.1, and Local Rules 65-1 and 65-2. If Johnson so moves, Dux will respond more fully at that time. For present purposes, Dux will briefly address the reasons why Johnson is not entitled to injunctive relief.

A plaintiff seeking preliminary injunctive relief generally "must demonstrate either: (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised as to the merits and that the balance of hardships tips in its favor." *Dep't of Parks & Recreation for State of Cal. v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1123 (9th Cir. 2006). A plaintiff seeking a permanent injunction "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006). Johnson cannot satisfy these requirements for several reasons. First, for the reasons discussed, Johnson does not have a likelihood of success on the merits of any of its substantive claims for relief. Second, Johnson has failed to plead facts showing that a remedy at law (i.e., damages) would be inadequate – this is a straightforward contract dispute concerning a business that can be measured in dollars and cents. Similarly, Johnson has failed to plead facts showing that it is at risk of suffering an irreparable injury. Again, this is a quantifiable contract dispute, and Johnson does not face any irreparable harm.

There is no basis for an injunction in this case.

V. CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted pursuant to Rules 8(a), 9(b), and 12(b)(6). At a minimum, Johnson should be required to make a more definite statement of the allegations against Dux pursuant to Rule 12(e).

Dated: December 7, 2007

Respectfully submitted

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
STEPHEN S. WALTERS
MARK J. SEIFERT

By: /s/
STEPHEN S. WALTERS
Attorneys for Defendants
DUX INTERIORS, INC. and
BO GUSTAFSSON